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No. 94-1239

In the Supreme Court of the United States

OCTOBER TERM, 1994

FULTON CORP., *Petitioner*

v.

JANICE H. FAULKNER, SECRETARY OF REVENUE,
Respondent

On Writ of Certiorari to the Supreme Court of North Carolina

RESPONDENT'S REPLY IN SUPPORT OF THE MOTION TO DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

MICHAEL F. EASLEY
Attorney General
MARILYN R. MUDGE*
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-3252

**Counsel of Record*

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TABLE OF AUTHORITIES

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Petitioner's response to the motion to dismiss the writ of certiorari as improvidently granted substantially confirms the motion's principal points. Petitioner carefully does *not* assert that repeal of the challenged tax was motivated by this Court's decision to grant review. Petitioner does *not* suggest that other taxes in other States would be affected by this Court's decision in this case. And petitioner evidently

recognizes that it would *not* be guaranteed a tax refund by a victory on the merits in this Court. In these circumstances, we respectfully suggest that it would be appropriate for the Court to dismiss the writ of certiorari as improvidently granted.

1. Petitioner's principal contention (Resp. 5-9) is that repeal of the intangibles tax was part of a Machiavellian scheme on the part of the State to retain unconstitutionally collected taxes when judicial review was imminent. That is demonstrably incorrect. We explain in the motion (at 3 n.1), and petitioner does not deny, that the intangibles tax surely would have been repealed even if this Court had denied review: the bill to repeal the tax was introduced and was approved by both Houses of the State Legislature *prior* to this Court's grant of certiorari, at a time when the tax had been *upheld* by a unanimous North Carolina Supreme Court and there was no reason to anticipate further review. This cannot fairly be characterized as a "state ploy[] to retain the fruits of unconstitutional taxes" (Resp. 6) and hardly serves as a model for future attempts to deny tax refunds. Indeed, the Legislature's decision to repeal the entire intangibles tax as it relates to corporate shares, rather than only the taxable percentage deduction challenged here, makes manifest that it was dissatisfaction with the tax, and not any intent to evade judicial review, that motivated legislative action.

2. Petitioner makes virtually no attempt to demonstrate that the legal issue presented here is of any continuing importance anywhere in the Nation. Although petitioner asserts in conclusory terms the "broader significance" of this action (Resp. 9), it points to *no* tax in *any* State whose validity would be affected by a decision on the merits in this case. And while petitioner asserts that state courts need guidance on the vitality of *Darnell* v. *Indiana*, 226 U.S. 390 (1912), that case has been cited only twice by state courts in the last 20 years: once by the courts below and once by the Indiana Supreme Court when that court considered the

validity of Indiana's since-repealed intangibles tax. *Indiana Dept. of State Revenue* v. *Felix*, 571 N.E.2d 287 (Ind. 1991).[1] It accordingly is quite clear that an opinion in this case addressing *Darnell* would be essentially advisory in nature.

3. Although petitioner asserts that it is entitled to a refund (Resp. 10), it ultimately acknowledges that it might very well *not* obtain a refund even if it prevailed on the merits of its Commerce Clause claim. Petitioner thus acknowledges that the State could cure the asserted discrimination by retroactively increasing the taxes of in-state beneficiaries of that discrimination -- and petitioner does not deny that such an increase would, as a practical matter, do it no good at all. See Mot. 5 n.2. Moreover, petitioner makes *no* response to our demonstration (at Mot. 5) that its probability of prevailing on remand is minimal in light of the state court of appeals' holding *as a matter of state law* that the taxable percentage deduction should be severed from the remainder of the tax code. At bottom, then, petitioner would have the Court decide a question of no continuing importance that in all likelihood would not affect even the substantial rights of the parties to this litigation.[2]

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[1] *Darnell* has been cited by state courts on only two other occasions since 1960. Once was for the boilerplate observation that "[t]o proceed with an argument based on the equal protection of the laws, a party must at least show that he has been discriminated against by the statute or action against which he complains." *People* v. *Adams*, 350 N.E.2d 767, 772 (Ill. App. 1976). The other was for the equally unexceptional point that "the court must determine that the party seeking to raise a constitutional claim or defense has shown that he has the requisite standing to do so." *Board of Commissioners* v. *Kokomo City Plan Comm'n*, 330 N.E.2d 92, 95 (Ind. 1975).

[2] It may be added that prevailing on the merits also would not entitle petitioner to its attorneys' fees in light of *National Private*

In making this argument, we plainly do not contend, as did the State in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989), that petitioner lacks standing to pursue its claim. Instead, we suggest as a prudential matter that it makes little sense for the Court to devote its resources to the resolution of an issue that almost certainly will not recur. Indeed, in an important respect the citation to *Texas Monthly* offered by petitioner (at Resp. 11-12) supports our point by noting that the choice of remedy in a case involving a constitutional challenge to state taxation (in this case, whether retroactively to increase taxes rather than grant a refund) is a matter of state law.

4. Petitioner is simply incorrect in its further contention (at Resp. 9-10) that the Court has not dismissed the writ in circumstances such as this one, where repeal of the challenged statute did not give the complaining party retroactive relief. In *Morris* v. *Weinberger*, 410 U.S. 422 (1973), for example, the statutory amendment did not, as petitioner would have it (at Resp. 9), "retroactively g[i]ve the petitioner the right sought." To the contrary, the Court dismissed the writ in that case even though "the new Act d[id] not provide coverage for petitioner's child but the old Act remain[ed] applicable to the claim before [the Court]." *Id.* at 424 (Douglas, J., dissenting). See also, *e.g.*, *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497 (1971) (Harlan, J., concurring) ("To the extent * * * that the instant case has any significance for the future, it seems to me that such issues should await a case arising under the new statute.").

Truck Council, Inc. v. *Oklahoma Tax Comm'n*, No. 94-688.

In these circumstances, it would be appropriate for the Court to dismiss the writ of certiorari as improvidently granted.

Respectfully submitted.

MICHAEL F. EASLEY
Attorney General
MARILYN R. MUDGE*
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-3252

**Counsel of Record*

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